IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KIMBERLY A. COGGER, a single woman in her individual capacity, Respondent, v. SANDERS S. BLAKENEY, M.D., and "JANE DOE" BLAKENEY, Appellants.	)	No. 64965-5-I UNPUBLISHED OPINION FILED: June 28, 2010

Schindler, J. — In this medical malpractice lawsuit, the jury found that Dr. Sanders Blakeney was negligent in the care and treatment of Kimberly Cogger and that his negligence was a proximate cause of her injuries. On appeal, Dr. Blakeney argues the trial court erred in denying his motion to dismiss because the presuit notice of intent to sue did not comply with the requirements of former RCW 7.70.100(1) (2006). Dr. Blakeney also asserts insufficient evidence supports the finding that his negligence caused the injury and challenges the admission of testimony regarding his treatment of other patients. We affirm the judgment on the verdict.

FACTS

Dr. Sanders Blakeney is an obstetrician-gynecologist (OB-GYN). On August 5, 2003, Dr. Blakeney performed an abdominal hysterectomy on Kimberly Cogger at Tacoma General Hospital. During the surgery, Dr. Blakeney accidentally lacerated her bladder. Dr. Blakeney testified that he repaired the laceration.

Cogger was discharged from the hospital on August 9. On August 11, Cogger's sister called Dr. Blakeney's office about the degree of pain and other symptoms Cogger was experiencing including bleeding, pain with urination, and an elevated temperature. On August 12, Cogger's sister called Dr. Blakeney's office expressing concern that Cogger might have a bladder infection. Dr. Blakeney saw Cogger the next day.

Dr. Blakeney insists that he examined Cogger on August 13. His August 13 notes state "wound-steri strips in place." But Cogger and her sister testified that apart from the nurse taking her temperature and blood pressure, Dr. Blakeney did not perform an examination, and only discussed Cogger's excessive use of pain medications.

Cogger called Dr. Blakeney's office on August 14 and on August 15 to report continued bleeding and a strange odor. On August 16, Cogger went to the emergency room at St. Francis Hospital. Cogger had acute abdominal pain, a slightly elevated temperature, and blood in her urine.

Board certified urologist Dr. Kevin Ward, examined Cogger and ordered a

CT scan of her abdomen and pelvis. The CT scan showed a large pelvic abscess. Dr. Ward concluded Dr. Blakeney's surgical repair of the bladder laceration had failed causing a bladder rupture, a pelvic abscess, and peritonitis.[1]

Dr. Ward admitted Cogger to the hospital and performed surgery the next morning. Dr. Ward's post-operative notes state that he investigated and repaired an "incision and injury" at the "base of the bladder." Because of the presence of a significant amount of necrotic tissue, Dr. Ward believed that the laceration was not recent. Dr. Ward inserted ureteral stents and evacuated the pelvic abscess. Because the surgery on August 17 did not completely repair the bladder injury, Cogger underwent additional surgeries.

On August 4, 2006, Cogger served Dr. Blakeney with a notice of intent to file a lawsuit. On November 2, 2006, Cogger filed a lawsuit against Dr. Blakeney in Pierce County Superior Court.[2] Dr. Blakeney filed a motion for summary judgment dismissal asserting Cogger failed to comply with the presuit filing requirements of former RCW 7.70.100(1) (2006). The court denied the motion.[3]

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[1] Peritonitis is inflammation and infection in the abdominal cavity.

[2] Cogger originally sued both Dr. Blakeney and Dr. Ward. Dr. Ward filed a motion for summary judgment dismissal claiming that Cogger could not establish negligence or causation. Cogger did not oppose the motion. On March 20, 2007, the court entered an agreed order dismissing the lawsuit against Dr. Ward.

[3] Dr. Blakeney later filed a second motion for judgment on the pleadings arguing that Cogger failed to file a "certificate of merit" under RCW 7.70.150. Dr. Blakeney does not appeal the court's denial of this motion. The Washington State Supreme Court recently ruled the statutory certificate of merit requirement is unconstitutional in Putman v. Wenatchee Valley

In January 2008, Dr. Blakeney's attorney filed a notice of intent to withdraw effective January 21. The trial began nearly a year later on December 2, 2008. Dr. Blakeney represented himself during the five-day jury trial.

Cogger, her sister, and her father testified at trial. Cogger presented the testimony of Dr. Ward and OB/GYN expert Dr. Jimmy Ross by deposition. Dr. Blakeney testified for more than a day.

In the special verdict form, the jury found that Dr. Blakeney was negligent in the care and treatment of Cogger and that his negligence was a proximate cause of her injuries. The jury awarded Cogger $1 million in damages. Dr. Blakeney appeals.

Presuit Notice

As a condition precedent to filing a medical malpractice action, former RCW 7.70.100(1) requires a claimant to provide a health care provider with a notice of intent to sue at least ninety days before filing a lawsuit. Cogger attempted to serve Dr. Blakeney with a notice of intent to sue on August 3, 2006. According to the declaration of the process server, Dr. Blakeney was unavailable but his secretary and receptionist Barbara Walker accepted service of the notice of intent to sue and the summons and complaint on his behalf. The process server's declaration states that Walker said Dr. Blakeney was with a patient, she was authorized to accept legal papers on his behalf, and she had done so in the past.

Medical Center, P.S., 166 Wn.2d 974, 216 P.3d 374 (2009).

Below, Dr. Blakeney argued that he was entitled to summary judgment dismissal because Cogger failed to properly serve him with a presuit notice of intent to sue as required by former RCW 7.70.100(1). Dr. Blakeney claims he did not have actual notice of Cogger's intent to sue before he received the summons and complaint. In her declaration, Walker did not deny that she accepted service of the notice of intent to sue and the pleadings for Dr. Blakeney. However, Walker states that she has no memory of giving the pleadings to Dr. Blakeney.

The court denied Dr. Blakeney's motion for summary judgment. The court ruled that the statute did not require actual notice to the health care provider and that the notice Cogger provided was "reasonably calculated to provide actual notice" to Dr. Blakeney.

On appeal, Dr. Blakeney contends, as he did below, that Cogger did not comply with the requirements of former RCW 7.70.100(1) because he did not receive actual notice of the intent to sue. Dr. Blakeney asserts that the notice delivered to his office and accepted by his secretary does not meet the requirements of former RCW 7.70.100(1).[4]

The interpretation and meaning of a statute is a question of law subject to de novo review. Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). The primary objective of statutory interpretation is to discern

[4] For the first time in his reply brief, Dr. Blakeney also argues that former RCW 7.70.100(1) is unconstitutionally vague. We decline to consider an argument raised for the first time in a reply brief. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

and implement legislative intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). To determine legislative intent, we first look to the language of the statute. We must give meaning to every word in a statute and presume the legislature did not use any superfluous words. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000). Absent ambiguity, a statute's meaning is derived from the language of the statute. We must give effect to the plain meaning of the statute as an expression of legislative intent. Campbell & Gwinn, 146 Wn.2d at 9-10.

The presuit notice provision of former RCW 7.70.100(1) was enacted in 2006 as a part of comprehensive amendments to the medical malpractice act. The purpose of the amendments is to address the high cost of medical malpractice insurance, provide incentives to settle cases before resorting to court, and improve the mediation process. Laws of 2006, ch. 8, § 1; Bennett v. Seattle Mental Health, 150 Wn. App. 455, 461-62, 208 P.3d 78 (2009).

Former RCW 7.70.100(1) provides, in pertinent part:

> No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.[5]

[5] As amended in 2007, Laws of 2007, ch. 119, § 1, RCW 7.70.100(1) now provides that "[t]he notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant." The 2007 amendment was characterized as a "technical fix" to the 2006 provision, which failed to address a number of procedural issues. See House Bill Report on SSB 5910, at 3, 60 Leg., Reg. Sess. (Wash. 2007).

Dr. Blakeney contends that the language of former RCW 7.70.100(1) stating "the defendant has been given … notice," means the defendant must receive "actual notice."[6] Dr. Blakeney argues that interpreting the language of former RCW 7.70.100(1) to mean notice that is reasonably calculated to provide actual notice is inconsistent with the language of the statute and the legislative intent to provide an incentive to settle.

To the extent that former RCW 7.70.100(1) sets forth explicit requirements, strict compliance with those requirements is mandatory. Bennett 150 Wn. App. at 456. In Bennett, this court held that because the statute explicitly requires a ninety-day waiting period, the claimant must wait until after the mandatory ninety-day waiting period has expired to file a lawsuit. But here, because the statute does not contain specific requirements for the provision of notice, actual notice of the presuit notice under former RCW 7.70.100(1) is not required. Jackson v. Sacred Heart Medical Ctr., 153 Wn. App. 498, 225 P.3d 1016 (2009).

In Jackson, the plaintiff filed a medical negligence lawsuit against Sacred Heart Medical Center and served the registered agent of the hospital with an offer to mediate and a copy of a proposed summons and complaint. On appeal, the hospital argued that the presuit notice was insufficient. In rejecting the

[6] Dr. Blakeney also argued that former RCW 7.70.100(1) required personal service of the presuit notice in accordance with the statute governing service of a summons, RCW 4.28.080. But Dr. Blakeney concedes in his reply brief that personal service was not required under former RCW 7.70.100(1).

hospital's argument, this court held that because the 2006 version of the statute does not require a "specific means of service of the notice of intent to sue," the notice was sufficient.[7] Jackson at 499.

Because former RCW 7.70.100 (1) does not require a specific means of serving the presuit notice, service of the presuit notice and acceptance by the secretary at Dr. Blakeney's office is consistent with the language of former RCW 7.70.100(1).

Proof of Causation

In the alternative, Dr. Blakeney argues that insufficient evidence of causation supports the jury finding that his negligence was a proximate cause of Cogger's injuries.[8] Dr. Blakeney claims there is no evidence that the bladder laceration Dr. Ward attempted to repair on August 17 was the same laceration that occurred during the surgery he performed on August 5. In support of his argument, Dr. Blakeney points to evidence indicating that the bladder incision that occurred during the hysterectomy was in a different position than the laceration found by Dr. Ward two weeks later. Dr. Ward described the injury as a "transverse incision" positioned where the back wall joins the dome of the bladder. Dr. Blakeney described the incision as on the "top and front of the bladder."

A plaintiff in medical negligence case "must produce competent medical

[7] The court in also held that the proposed summons and complaint provided notice of the intent to sue.

[8] Dr. Blakeney does not challenge the sufficiency of the evidence supporting the jury determination of negligence.

expert testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care." Seybold, v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). Expert testimony must be based on a reasonable degree of medical certainty. McLaughlin v. Cooke, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989). Expert opinion "'must be based on facts in the case, not speculation or conjecture.'" Seybold, 105 Wn. App. at 677 (quoting Theonnes v. Hazen, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984). The testimony must show "'that the injury-producing situation 'probably' or 'more likely than not' caused the subsequent condition, rather than that the accident or injury 'might have,' 'could have,' or 'possibly did' cause the subsequent condition.'" Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973) (quoting Ugolini v. States Marine Lines, 71 Wn.2d 404, 407, 429 P.2d 213 (1967)).

Overturning a jury verdict is appropriate only if "it is clearly unsupported by substantial evidence." Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). The "substantial evidence" test is met where there is sufficient evidence to persuade a rational, fair-minded person of the truth of the premise. Winbun v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001). In reviewing the evidence, the appellate court cannot reweigh the evidence, draw its own inferences, or substitute its judgment for that of the jury.

> This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from

> the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Burnside, 123 Wn.2d at 108, (citations and italics omitted) (quoting State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)).

Dr. Ward testified that based on his training and experience, the bladder laceration he observed on August 17 occurred during the hysterectomy surgery Dr. Blakeney performed on August 5. According to Dr. Ward, the injury was more likely than not the same injury that Cogger sustained when Dr. Blakeney accidentally lacerated her bladder.

Dr. Ward conceded that the location of the injury he found did not "totally match" the accidental incision described in Dr. Blakeney's operative notes.[9] While Dr. Blakeney's post-operative note did not actually state the location or size of the laceration, Dr. Ward interpreted the note as indicating a vertical incision toward the front of the bladder. Dr. Ward testified that because the location of the laceration was within the operative field for an abdominal hysterectomy, Dr. Blakeney could have accidentally lacerated the bladder a second time during the August 5 surgery.

Dr. Ward also testified that more likely than not, the repair failed because Dr. Blakeney did not thoroughly test the repair. Dr. Ward testified that by

[9] Dr. Blakeney's previous repair was not visible on August 17 because of the type of sutures used and the two-week interval between the surgeries.

removing the Foley catheter three and a half days after surgery, the tissue did not properly heal.

Dr. Ward was asked several times whether apart from lacerating Cogger's bladder during the August 5 surgery, there was any other way the bladder laceration could have occurred. Dr. Ward denied that there was any other plausible explanation for the laceration and said he could not "imagine" such a scenario. When asked: "is there any way we can think of that this large defect you saw on August 17th [sic] could have happened post August 5 surgery,?" Dr. Ward replied, "[n]ot in this individual."

In short, Dr. Ward testified that the bladder laceration injury he attempted to repair on August 17 occurred during the surgery on August 5. Based on his training and experience, Dr. Ward concluded that the defect he saw on August 17, "in some shape or form, existed on August 5th [sic] 2003."

Cogger's OB/GYN expert Dr. Ross testified that Dr. Blakeney breached the standard of care in removing the Foley catheter after only three and a half days.[10] Dr. Ross agreed with Dr. Ward's opinion that if Dr. Blakeney had left the Foley catheter in place for an additional two weeks, "more likely than not, Ms. Cogger would not have had the subsequent complications regarding her bladder injury."

The expert testimony of Dr. Ward and Dr. Ross supports the jury finding

[10] "[W]hen he took the Foley catheter out after really only about three and a half days following surgery, which would give the patient a much higher risk of possibly breaking that repair down."

that the hysterectomy Dr. Blakeney performed on August 5 was the proximate cause of Cogger's injuries.

Dr. Blakeney also asserts that Cogger did not prove causation because the evidence suggests that her bladder could have spontaneously ruptured. Based on a spontaneous rupture, Dr. Blakeney argues that even if his operative or post-operative treatment fell below the standard of care, there is no causal connection between his treatment and Cogger's injuries. Dr. Blakeney's assertion is not supported by the evidence. No witness, including Dr. Blakeney, testified about the likelihood of a spontaneous bladder rupture.[11]

Admission of Rebuttal Testimony

Dr. Blakeney also contends the trial court abused its discretion in admitting rebuttal testimony about bladder injuries that other patients suffered during surgeries that he performed.

In her case in chief, Cogger did not seek to introduce the portions of Dr. Ward's deposition testimony where he discussed treating other patients who had sustained bladder injuries during surgeries performed by Dr. Blakeney.[12]

During the presentation of his case, Dr. Blakeney testified that in the course of his 25-year practice, he had only inadvertently injured the bladder of a

[11] Moreover, while Dr. Blakeney testified that it "appeared" to him that Cogger "developed another tear," his testimony conflicted with Dr. Ward's opinion that to a reasonable degree of medical certainty, the injury occurred at the time of Cogger's hysterectomy.

[12] Dr. Ward testified that prior to treating Cogger, he had treated another bladder laceration injury that occurred during a hysterectomy performed by Dr. Blakeney, and he later treated three of Dr. Blakeney's patients for similar bladder injuries.

patient during surgery on three occasions. On cross examination, Dr. Blakeney confirmed that the inadvertent injury to Cogger's bladder was one of the three instances he was referring to and denied that the number was higher.

Based on Dr. Blakeney's testimony, Cogger argued that she was entitled to present Dr. Ward's testimony about the bladder injuries sustained by the other patients to contradict Dr. Blakeney's claim that he only inadvertently lacerated a patient's bladder three times in 25 years. Because Dr. Blakeney raised the issue, the court allowed Cogger to rebut his testimony with the excluded portions of Dr. Ward's testimony concerning other patients who suffered bladder injuries during surgeries performed by Dr. Blakeney.

We review the trial court's evidentiary rulings for an abuse of discretion. City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). The trial court abuses its discretion when its "'decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting Associated Mtg. Invest. v. G.P. Kent Const., Co., 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

While Dr. Blakeney contends that evidence was inadmissible because the prejudice of the testimony outweighed the probative value, he does not dispute the fact that he raised the issue during his testimony.[13] Under the well-established doctrine of "opening the door," the trial court has the discretion to

[13] Dr. Blakeney complains that Dr. Ward was not subject to cross examination. Dr. Blakeney was represented by counsel at the time of the deposition and his lawyer cross examined Dr. Ward, although not on this specific issue.

admit otherwise inadmissible evidence when the opposing party raises a material issue. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). Because Dr. Blakeney raised the question of how many times he had accidentally lacerated a patient's bladder during surgery, the court did not abuse its discretion in allowing Cogger to present Dr. Ward's testimony to rebut Dr. Blakeney's material assertion. See Estate of Stalkup v. Vancouver Clinic, Inc., P.S., 145 Wn. App. 572, 187 P.3d 291 (2008) (party who actively produced evidence of negligence unrelated to injury could not complain that such evidence was inadmissible); Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003) (otherwise inadmissible evidence is admissible if a party opens the door to the evidence during direct examination).

We affirm the judgment on the verdict.

Schindler, J.

WE CONCUR:

Grosse, J.